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No. _____

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IN THE

Supreme Court Of The United States

OCTOBER TERM 1983

BARRON COLLIER, D/B/A
OZARK TROUT FARM ..... *Petitioner*

v.

CITY OF SPRINGDALE AND
THE SPRINGDALE WATER
AND SEWAGE COMMISSION ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

GEORGE E. BUTLER, JR.
120 West Spring Street
Fayetteville, Arkansas 72701
(501) 442-5211
Attorney for Petitioner

QUESTION(S) PRESENTED FOR REVIEW

Whether an inverse condemnation or other taking of property by a municipal corporation, whether negligent or intentional is, under Arkansas law, without due process so that the act gives rise to an action under Title 42 U.S.C. §1983.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Barron Collier, d/b/a Ozark Trout Farm, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in Barron Collier, d/b/a Ozark Trout Farm v. City of Springdale and the Springdale Water and Sewage Commission, on May 8th and June 5th, 1984.

OFFICIAL REPORTS FROM COURTS BELOW

The opinion of the United States District Court, Western District of Arkansas, Fayetteville Division, in *Barron Collier, d/b/a Ozark Trout Farm* v. *City of Springdale and the Springdale Water and Sewer Commission*, on February 12, 1983, is reproduced at Appendix I hereto, page A-1, infra. The opinion of the United States Court of Appeals for the Eighth Circuit, entered on May 8, 1984, is reproduced at Appendix II hereto, page A-16, infra. The opinion of the United States Court of Appeals for the Eighth Circuit, entered on June 5, 1984, is reproduced at Appendix III hereto, page A-16, infra.

GROUNDS FOR INVOKING JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Petitioner seeks to have the Court review the Order of the United States Court of Appeals for the Eighth Circuit entered on May 8th, 1984, and the Order, dated June 5th, 1984, overruling Petitioner's Petition for Rehearing.

The Court has jurisdiction to review this matter pursuant to 28 U.S.C. 1254 (1).

STATEMENT OF CASE

This was an action for damages and an injunction against a municipal corporation, its water and sewer commission, and the individual members of the commission.

The suit was brought under 42 U.S.C. §1983, as a civil rights action.

The case was tried before a jury of twelve sitting in the Federal Court building in Fayetteville, Arkansas. The trial began on February 14, 1983. The jury rendered its verdict on February 16, 1983.

Prior to submitting the issues to the jury on "Special Interrogatories", the trial judge instructed that he had, as a matter of law, dismissed the claims against the three individual defendants. He further instructed that the City and the Water and Sewer Commission were to be treated as a single entity. Transcript pp. 645, 646.

The plaintiff, as leaseholder and operator of a trout farm near Johnson, Arkansas, and on the outskirts of Springdale, Arkansas, originally filed, on September 16, 1980, an action in the Washington County Circuit Court, alleging destruction of his trout as a result of the City of Springdale's "unlawfully and illegally discharging said raw sewage and waste into the groundwater system". *Barron Collier, d/b/a Ozark Trout Farm* v. *City of Springdale*, Wash. Co. Cir. Case No. CIV 80-1048. Plaintiff subsequently amended his complaint to

add the individual members of the Springdale Water and Sewer Commission as parties defendant.

The defendants, in their answers, raised defenses of municipal and individual immunity to tort actions.

A second amendment alleged a taking and damage without due process of law and asked for relief under 42 U.S.C. §1983. Plaintiff also moved the Circuit Court to remove the case to Federal District Court. No action was taken on the motion. The plaintiff moved to dismiss the Circuit Court action and it was dismissed on November 2, 1981.

The plaintiff filed the present action in the Federal District Court on November 19, 1981. The Complaint alleged negligence and illegal taking. It depended on 42 U.S.C. §1983 and 28 U.S.C. §1343 for jurisdiction.

On February 4, 1983, defendants filed their Motion to Dismiss, asserting that: (1) there was an adequate state remedy; (2) because of the availability of the remedy, the plaintiff was not without due process for any wrongful taking or damage; (3) plaintiff was not deprived of any constitutionally guaranteed rights, privileges or immunities; and (4) there could be no civil rights violation under 42 U.S.C. §1983, and the court was thus without jurisdiction to hear the matter. Clerk's Record pp. 36, 37.

In its Memorandum and Order, entered on February 12, 1983, the court denied defendant's Motion to Dismiss. In so doing, the court justified its decision

with several major points which will be only summarized here. The opinion should be consulted for the complete text.

First, after observing that the defendants had relied heavily on the holding in *Parratt, et al* v. *Taylor*, 451 U.S. 527 (1981), the court found that *Parratt* was not necessarily controlling under the facts of the present case. The court pointed out that several courts have held that *Parratt* does not extend to intentional acts, though a number have concluded that it extends to intentional as well as negligent deprivations of property. Clerk's Record pp. 41-44.

Next, the court stated that the negligent vs. intentional distinction was not critical to the choice of whether or not *Parratt* would apply. The controlling factor was whether, under the given fact situation, the state remedies were adequate to satisfy due process requirements. The court stated, "In circumstances where the deprivation occurs as a result of official policy or procedure, and where the defendants knew in advance of the likelihood that the property would be taken or destroyed, the existence of post-deprivation remedies does not ensure due process of law." Clerk's Record p. 44. Noting that the possibility that the defendants could have an official policy which would call for the discharge of raw sewage in certain circumstances, the court determined that such was a fact issue which should be left for the jury. Clerk's Record p. 47.

Finally, the court pointed out that negligent deprivation could provide jurisdiction for a §1983 claim and

that since the state immunized municipalities and political subdivisions from such claims under *Ark. Stat. Ann.* §12-2901, the plaintiff in the present case would be denied due process because the state remedy would not be available to him. Clerk's Record p. 47.

GROUNDS FOR ALLOWANCE OF WRIT OF CERTIORARI

Rule 17 provides that this Court may exercise its discretion to review a case when a state or federal court has decided an important question of federal law which has not been, but should be, settled by this Court or has decided a federal question in a way in conflict with applicable decisions of this Court.

The U.S. Court of Appeals, in its opinion dated May 8th, 1984, extended the doctrine of *Parratt* v. *Taylor*, 451 U.S. 527 (1981) and found that the existence of a post-deprivation remedy barred Petitioner from pursuing an action under 42 U.S.C. 1983. The state of the law since *Parratt*, in regard to the 1983 actions is unclear, as several courts have held that *Parratt* does not extend to intentional acts. *Weis* v. *Lehman*, 676 F.2d 1320, 1323 (9th Cir. 1982); *Schiller* v. *Strangis*, 540 F. Supp. 605, 615 (D. Mass. 1982); *Howse* v. *DeBerry Correctional Institute*, 537 F. Supp. 1177, 1180 (M.D. Tenn. 1982) ("This Court does not believe that the Supreme Court intended *Parratt* to be applied automatically and unthinkingly to every instance in which a section 1983 claim can be said to resemble a state tort action. *Parratt's* effect is limited by

its facts, and it is inapplicable to any claim other than those alleging negligent deprivations of property."); *Peters* v. *Township of Hopewell,* 534 F. Supp. 1324, 1334 (D.N.J. 1982); *Miller Newspapers, Inc.* v. *City of Keene,* 546 F. Supp. 831, 836, n.5 (D.N.H. 1982). A number of other courts have concluded that *Parratt* extends to intentional as well as negligent deprivations of property. *Gilday* v. *Boone,* 657 F.2d 1, 2, n.1 (1st Cir. 1981); *Waterstratt* v. *Central State Hospital,* 533 F. Supp. 274 (W.D. Va. 1982); *Sheppard* v. *Moore,* 514 F. Supp. 1372 (M.D.N.C. 1981).

Furthermore, as Judge Eisele pointed out in his opinion of February 12, 1983, that the controlling factor is whether under a given fact situation, the state remedies were adequate to satisfy due process requirements. Pointing out further that the existence of post deprivation remedies does not ensure due process.

Further, it is Petitioner's position that the Court of Appeals erred when it failed to grant Petitioner's Petition for Rehearing. Clearly, when the concepts of judicial economy, convenience and fairness to litigants are considered, the pendant jurisdiction of the federal courts should be exercised, and not require all the same issues to be relitigated. The Court of Appeals overruled this request with no comment, in a one (1) sentence Order, because of this, Petitioner believes that the failure of the Court to exercise that jurisdiction also falls under Rule 17 in that it departed from the accepted and usual course of judicial proceedings.

For the foregoing reasons, it is submitted that a Writ of Certiorari should issue to review the May 8th and June 5th, 1984, decisions of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

BARRON COLLIER, D/B/A
OZARK TROUT FARM, *Petitioner*

By: GEORGE E. BUTLER, JR.
GEORGE E. BUTLER, JR.
120 West Spring Street
Fayetteville, AR 72701
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, George E. Butler, Jr., attorney for petitioner herein,state that I have this 25th day of July, 1984, caused to be deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing Petition for Writ of Certiorari, to the Honorable Thurston A. Thompson, attorney for the respondent, at his mailing address of 113 E. Emma, Springdale, Arkansas 72764, and to the Honorable Charles E. Davis, at his mailing address of P. O. Box 6, Springdale, Arkansas.

/s/ George E. Butler, Jr.
George E. Butler, Jr.
Attorney for Petitioner

Appendix

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

BARON COLLIER, d/b/a
OZARK TROUT FARM — PLAINTIFF

v. NO. 81-5144

CITY OF SPRINGDALE, et al. — DEFENDANTS

MEMORANDUM AND ORDER

Pending before the Court is the motion to dismiss of the defendant, City of Springdale.

Plaintiff owns a trout farm near Springdale. He alleges that on July 28, 1977 and July 13, 1980 the defendants[1] "*permitted* a large volume of waste and raw sewage to enter the ground water system which resulted in a sudden massive fish . . . kill at the Ozark Trout Farm." Plaintiff's Complaint, ¶10, *emphasis added*. The two occurrences allegedly resulted from the fact "[t]hat the defendants at the Bradshaw Lift Station maintained a by-pass and overflow pipe which allowed excess waste and sewage to enter the ground and water." Complaint, ¶8. The defendants "knew or should have known that they were allowing excess water and sewage to enter the ground water system through the said overflow pipe." Complaint, ¶15. The

[1] Named as defendants were the city and the individual members of the Springdale Water and Sewage Commission.

complaint notes that the "by-pass and overflow pipe" is no longer in operation, but that the probability of additional sewage discharges remains. Complaint, ¶18. The plaintiff further alleges that "as a result of the *negligent* destruction which killed said trout by unlawfully and illegally discharging said raw sewage and waste into the ground water", the plaintiff suffered $126,804.00 in damages. Complaint, ¶13, *emphasis added*. Continuing damages of $200.00 per day are requested "for each day the defendant continues to maintain such a dangerous facility." *Id*.

Plaintiff claims that the actions of the defendants constituted a taking of his property without due process of law in violation of his rights under the 14th Amendment to the United States Constitution. Plaintiff seeks redress of those rights pursuant to 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343.

The defendant commission members have previously moved for summary judgment. The city did not join in that motion. The commission argued: (1) that it was immune from suit under Ark. Stat. Ann. § 12-2901 (Repl. 1979) which immunizes "counties, municipal corporations . . . and all other political subdivisions of the state" from tort liability; (2) that it was entitled to qualified immunity because all actions were taken in good faith; and (3) that the plaintiff had "failed to allege facts suggesting an abuse of power under negligence to the Stature of a Constitutional violation under 42 U.S.C. § 1983." Motion for Summary Judgment, ¶3.

The Court denied the motion in a memorandum and order dated October 19, 1982. With respect to the immunity issue, the Court ruled that "defendants' state immunity from tort liability does not affect their liability for a violation of plaintiff's constitutional rights under 42 U.S.C. § 1983. The plaintiff's complaint does not allege negligence or any other tort theory as a basis of liability. Rather, it is based solely on an alleged violation of plaintiff's constitutional right not to be deprived of his property without due process of law." Memorandum and Order at 3. The basis for that holding was *Owen* v. *City of Independence,* 445 U.S. 622 (1980). The claim of good faith immunity remained, by the Court's holding, a genuine issue of material fact. On the defendants' third argument, the Court concluded that the plaintiff had alleged more than a mere negligence as a predicate for an unconstitutional deprivation of property. The Court characterized the plaintiff's complaint as alleging "an intentional and deliberate taking of his property," and concluded that such an intentional taking was cognizable under § 1983. Memorandum and Order at 7. The Court left open the question of whether negligence, by itself, was actionable under § 1983.

The defendant city has now moved to dismiss (motion filed February 4, 1983). The defendant argues that the plaintiff has a remedy for an intentional taking in Arkansas state court. Thus, the defendant argues, the city has not deprived the plaintiff of his property *without due process of law*.

Article 2 § 22 of the Arkansas Constitution provides:

> The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.

Ark. Stat. Ann. § 35-101 (Repl. 1962) provides:

> Whenever any corporation authorized by law to appropriate private property for its use shall have entered upon and appropriated any property real or personal, the owner of such property shall have the right to bring an action against such corporation in the circuit court of the county in which said property is situated for damages for such appropriation at any time before an action at law or in equity for the recovery of the property so taken, or compensation therefor, would be barred by the statute of limitations and the measure of recovery in such action shall be the same as that governing proceedings by corporations for the condemnation of property.

In *Weathers* v. *City of Springdale*, 239 Ark. 535, 390 S.W.2d 125 (1965), the Arkansas Supreme Court implicitly recognized that § 35-101 grants riparian landowners a cause of action against a municipality for the intentional dumping of raw sewage into a stream. The court reversed the trial court's holding that the plaintiff's claim for damages was barred, on *res judicata* grounds, by a previous decree from a chancery

court enjoining the city from dumping the sewage into the particular stream in question. The Arkansas Supreme Court held that the chancery court was without jurisdiction to award damages in that the equitable action was not brought in the county where the lands were situated — a jurisdictional requisite for the award of damages in an "inverse condemnation" action instituted pursuant to § 35-101. The court therefore held that the chancery decree was not *res judicata,* and reversed and remanded. The issue of whether the willful dumping of raw sewage was actionable under § 35-101 was not before the court, although it assumed, for the purposes of the appeal, that it was.

There has been no other case interpreting § 35-101 on analogous facts. On its face, the statute appears to provide a claim for compensation for the intentional dumping of sewage, and the Court will assume, for the purpose of this motion, that such an action is maintainable.

Because the State of Arkansas provides the plaintiff a remedy, the city argues that the alleged property deprivation is not without due process. The defendant relies principally on *Parratt* v. *Taylor,* 451 U.S. 527 (1981). In *Parratt* a Nebraska prison inmate alleged that prison officials negligently lost an article of property. Despite the existence of an administrative claims procedure established by Nebraska law, the plaintiff filed suit in federal court under § 1983. The District Court granted plaintiff relief and the Eighth Circuit affirmed. The Supreme Court reversed.

The Court noted that in some instances, simple negligence may be cognizable under § 1983.

> Nothing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights. In *Baker* v. *McCollan,* 448 U.S. 137 (1979), we suggested that simply because a wrong was negligently as opposed to intentionally committed did not foreclose the possibility that such action could be brought under § 1983 . . . Both *Baker* v. *McCollan* and *Monroe* v. *Pape,* 365 U.S. 167 (1961), suggest that § 1983 affords a "civil remedy" for deprivations of federally protected rights caused by persons acting under color of state law *without any express requirement of a particular state of mind.* Accordingly, in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Emphasis added.*

Id. at 534, 535.

The Court concluded that the plaintiff had failed to establish a violation of his 14th Amendment rights. "[E]ven though (the) negligently caused (loss of prop-

erty) amounted to a deprivation,"[2] *Id.* at 536-7, the Court held that such deprivation was not without due process because the tort remedies of the State of Nebraska provided a means of redress.

The Court reasoned that a predeprivation hearing was not an essential requirement of procedural due process on the facts of that case. Recognizing that notice and a predeprivation hearing were required where the deprivation was "pursuant to some established state procedure and 'process' could be offered before any actual deprivation took place," *Id.* at 537, the Court held that postdeprivation proceedings satisfied the Constitution in numerous cases where quick action by the State was necessary or where any meaningful preloss process was impractical. Because the loss in *Parratt* was an unforeseeable negligent act, the Court concluded that a predeprivation hearing would have been impossible. The loss was not occasioned by a systemic policy or practice. "Indeed, the deprivation occurred as a result of the unauthorized failure of agents

[2] *But see* the concurring opinion of Justice Stewart. "It seems to me extremely doubtful that the property loss here, even though presumably caused by the negligence of state agents, is the kind of deprivation of property to which the 14th amendment addresses." 451 U.S. at 544. Justice Powell similarly concluded in his concurrence that the inmate's negligent loss of property was not an unconstitutional deprivation, regardless of the process afforded. Although only three justices joined in the majority opinion authored by Justice Rehnquist, only Justices Stewart and Powell took issue with the conclusion that negligent deprivations of property, when unaccompanied by due process, are violations of the 14th amendment. *Accord, Mills* v. *Smith,* 656 F.2d 337, 340 n.2 (8th Cir. 1981) (the Eighth Circuit reads *Parratt* as indicating that "negligence may be enough in some cases to support recovery under § 1983 for loss of property.")

of the State to follow established state procedure." *Id.* at 543.

The Court concluded by noting:

> To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul* v. *Davis*, 424 U.S. 693, 701 (1976). We do not think that the drafters of the Fourteenth Amendment intended the amendment to play such a role in our society.

Id. at 544.

The city now urges dismissal on the basis of *Parratt*. The existence of the post-deprivation "inverse condemnation" procedure in state court insures the plaintiff due process of law, according to the defendant's argument. While the Court considers the question

a close one, the motion to dismiss will be denied. The reach of *Parratt* does not extend to the facts of this case.

First of all, as noted in the Court's order denying the commission's motion for summary judgment, the plaintiff has alleged an intentional and deliberate deprivation of his property. A number of courts have held that *Parratt* does not extend to intentional acts. *Weis* v. *Lehman*, 676 F.2d 1320, 1323 (9th Cir. 1982); *Schiller* v. *Strangis*, 540 F. Supp. 605, 615 (D. Mass. 1982); *Howse* v. *DeBerry Correctional Institute*, 537 F. Supp. 1177, 1180 (M.D. Tenn. 1982) ("This Court does not believe that the Supreme Court intended *Parratt* to be applied automatically and unthinkingly to every instance in which a section 1983 claim can be said to resemble a state tort action. *Parratt's* effect is limited by its facts, and it is inapplicable to any claims other than those alleging negligent deprivations of property."); *Peters* v. *Township of Hopewell*, 534 F. Supp. 1324, 1334 (D.N.J. 1982); *Miller Newspapers, Inc.* v. *City of Keene*, 546 F. Supp. 831, 836, n.5 (D.N.H. 1982). A number of other courts have concluded that *Parratt* extends to intentional as well as negligent deprivations of property. *Gilday* v. *Boone*, 657 F.2d 1, 2, n.1 (1st Cir. 1981); *Waterstratt* v. *Central State Hospital*, 533 F. Supp. 274 (W.D. Va. 1982); *Sheppard* v. *Moore*, 514 F. Supp. 1372 (M.D.N.C. 1981). Neither the Eighth Circuit Court of Appeals nor any court in the Eastern or Western Districts of Arkansas have spoken on this issue.[1]

[1] In *Hunt et. al.* v. *City of Fayetteville*, Civ. No. 82-5094 (W.D. Ark. Sept. 7, 1982), the Honorable H. Franklin Waters granted the city's mo- (fn. continued)

An analysis of the cases reveals that the distinction between negligent and intentional acts is not the critical difference which determines whether *Parratt* will apply to a given case. The controlling factor is whether or not the state remedies are adequate, in a given factual situation, to satisfy constitutional standards of due process of law. Justice Rehnquist concluded in *Parratt* that a *post facto* remedy was adequate because the official action was not done pursuant to an established policy (the prison official had simply lost the inmate's property) and because the particular deprivation involved was not amenable to prior control (the negligent deprivation was mere happenstance which could not be predicted).[4] In circumstances where the deprivation occurs as a result of official policy or procedure, and where the defendants knew in advance of the likelihood that the property would be taken or destroyed, the existence of post-deprivation remedies does not insure due process of law. Obviously, negligent acts are much more likely to be unanticipated and unrelated to official policy than are intentional acts, and thus much more likely to fall within the *Parratt* holding. But the fact that the defendants' actions are

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tion to dismiss in a case remarkably similar to this one. The plaintiffs alleged that the City of Fayetteville allowed raw sewage to be dumped onto land near their homes, decreasing their property values and making their homes uninhabitable. Judge Waters concluded that the complaint did not state a claim for relief under § 1983, but did not mention the implications of *Parratt* v. *Taylor*.

[4] The Court also emphasized that where the state must respond to emergency situations, such as the preservation of food, the impracticality of a predeprivation hearing is obvious. There is no argument that the City of Springdale was responding to any emergency situation in the conduct of its sewage practices.

termed negligent or intentional does not automatically trigger the holding in *Parratt*.

This concept is illustrated by Justice Blackmun's concurrence, joined in by Justice White, in *Parratt*:

> I do not understand the Court to suggest that the provision of "postdeprivation remedies," *ante*, at 538, within a state system would cure the unconstitutional nature of a state official's intentional act that deprives a person of property. While the "random and unauthorized" nature of negligent acts by state employees makes it difficult for the State to "provide a meaningful hearing before the deprivation takes place," *ante*, at 541, it is rare that the same can be said of intentional acts by state employees. *When it is possible for a State to institute procedures to contain and direct the intentional actions of its officials, it should be required, as a matter of due process, to do so. See Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). In the majority of such cases, the failure to provide adequate process prior to inflicting the harm would violate the Due Process Clause. The mere availability of a subsequent tort remedy before tribunals of the same authority that, through its employees, deliberately inflicted the harm complained of, might well not provide the due process of which the Fourteenth Amendment speaks.

Id. at 546, *emphasis added.*

In *Palmer* v. *Hudson*, Slip Op. No. 81-6967 (4th Cir., January 6, 1983) (51 U.S.L.W. 2424) the court held that a prison inmate's allegation of intentional destruction of his property during an alleged assault and shakedown was not cognizable under § 1983 because the state provided an adequate postdeprivation remedy. Even though the deprivation was intentional, the Court correctly reasoned that after the fact remedies were adequate because the act was "random and unauthorized" and "there is no practical mechanism by which Virginia could prevent its guards from conducting personal vendettas against prisoners other than by punishing them after the fact." Slip Op. at 1, 5.

Similarly in *Rutledge* v. *Arizona Bd. of Regents*, 660 F.2d 1345 (9th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3682 (1982), the court held that an intentional but unanticipated assault and battery was not capable of any predeprivation process, and thus the existence of a postdeprivation hearing precluded, on the basis of *Parratt*, any § 1983 claim. *Id.* at 1352.

A different situation obtains where the intentional act is done pursuant to official state practice and the act allows for process prior to the deprivation. In *Tarkowski* v. *Hoogasian*, 532 F. Supp. 791 (N.D. Ill. 1982), landowners brought a § 1983 action against Illinois state attorneys and their agents, who lawfully entered upon plaintiff's land to remove certain items of personal property pursuant to a court order, for the intentional destruction of property not listed in the court order. The court held that the claim was cognizable under § 1983, *Parratt* notwithstanding.

> Application of *Parratt* to cases where deprivation of property by a state official allegedly was intentional would make section 1983 unavailable in all but those very few instances where state law does not provide an "adequate" remedy for alleged constitutional deprivations. *Monroe* did not chart such a restrictive perimeter for section 1983 litigation. On the contrary, Justice Douglas noted in *Monroe* that section 1983 overlaps some state remedies and is in that sense "supplementary" . . . "A state officer who uses his office and the power of the state to lawlessly confiscate, damage, or destroy the property of another deprives that person of due process regardless of any consideration concerning hearings." We do not read *Parratt* as going beyond its own facts. The Court, in *Parratt*, certainly did not repeal section 1983 in cases in which a state official's intentional deprivation of constitutional rights including property rights is involved simply because a state tort action may be available. Only Congress could effect such a repeal and it has not done so.

Id. at 794-5, (quoting *Kimbrough* v. *O'Neil*, 523 F.2d 1057, 1061 (7th Cir. 1975)).

In *McCowen* v. *City of Evanston*, 534 F. Supp. 243 (N.D. Ill. 1982), the plaintiff brought a § 1983 action against the city because the city's police department assisted a private individual in towing away a car in which the plaintiff claimed a property interest. Although the plaintiff had a cause of action in tort in state court which, the court agreed, complied with all of the

requirements of due process, the state remedy did not allow for any preloss process. The plaintiff could therefore claim a violation of his 14th Amendment rights under § 1983.

Applying the above principles to the case at bar, and construing the allegations in the complaint in the light most favorable to the plaintiff, the Court concludes that the plaintiff has stated a claim for relief under § 1983. The plaintiff alleges that the defendants knowingly allowed untreated sewage to enter the groundwater by maintaining a by-pass or overflow pipe which they "permitted" to remain in operation even after the first fish kill occurred in July 1977. Those allegations suggest that the defendants had the opportunity to assess the likelihood of future problems, take corrective action, or at least give notice and allow the plaintiff the opportunity to voice his opposition to the city's sewage practices. It is possible, based on the plaintiff's allegations, that the actions of the defendants were done pursuant to official city policy or practice. Perhaps the commission concluded, for reasons of cost or for any other reason, that the official city policy would be to maintain overflow pipes to allow for the discharge of raw sewage in certain circumstances. Those possibilities are raised by the allegations in the complaint and preclude the dismissal of the City of Springdale from this lawsuit. In any event, those are factual issues which will remain for resolution at trial.

The Court also notes, for the benefit of the attorneys in anticipation of trial, that the theory of negligence is also cognizable as claim for property depriva-

tion maintainable under § 1983. *See,* n.2, *supra,* and accompanying text. With respect to negligence, it is clear that the state provides no remedy – either before or after the deprivation. Ark. Stat. Ann. § 12-2901 immunizes municipalities and political subdivisions from tort liability. The Court has previously held, and reiterates today, that that immunity is not available to the defendants in a claim for relief under § 1983. Nevertheless, it is clear that that immunity provision precludes any state remedy and therefore, under the reasoning in *Parratt,* the plaintiff may claim a deprivation of his property without due process of law because of the negligent acts of the defendant.

Depending on the evidence produced at trial, the Court will instruct the jury under theories of both intentional and negligent deprivation, in accordance with the principles discussed in this memorandum.

It is therefore Ordered that the defendant's motion to dismiss be, and it is hereby, denied.

Dated this 12th day of February, 1983.

Garnett Thomas Eisele
United States District Judge

APPENDIX II

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 83-1567

Barron Collier, d/b/a Ozark Trout Farm.

Appellee

v.

City of Springdale, Walter Turbo, Larry Clinkscales, Harold Henson, The Board of Directors of the City of Springdale, Springdale Water & Waste, a/k/a Springdale Water & Sewage Commission,

Appellants.

Appeal from the United States District Court for the Western District of Arkansas

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Submitted: December 12, 1983

Filed: May 8, 1984

Before McMILLIAN, JOHN R. GIBSON and BOWMAN, Circuit Judges.

McMILLIAN, Circuit Judge.

The City of Springdale and the Springdale Water and Sewage Commission appeal from a final judgment entered in the District Court for the Western District of Arkansas after a jury trial awarding Barron Collier $36,740.00 for damages he sustained as the result of two sewage discharges. For reversal appellants argue that although Collier's property has been appropriated for public use, Arkansas law protects his constitutional right to just compensation and thus Collier has failed to demonstrate a constitutional violation cognizable under 42 U.S.C. § 1983. We agree. For the reasons discussed below, we reverse and remand with directions that the district court dismiss this action.

I. FACTS

Springdale Water and Sewer Commission (Commission) is a public agency created by the City of Springdale, Arkansas (City). Pursuant to its authority, the Commission operates and maintains a system of sewage collection pipes, hydraulic lift stations and a sewage treatment facility. The Bradshaw lift station is a small lift station located in the southwest part of the City. In compliance with the then applicable state and federal regulations, the Bradshaw lift station was designed in 1963 by a qualified civil engineer. The appropriate state and federal agencies approved the plans and specifications for the Bradshaw lift station.

To permit access for repair in the event of a mechanical failure at the Bradshaw lift station, the original

design included the installation of an overflow pipe. The overflow pipe was designed to carry sewage away from the lift station and discharge it into a segment of dry creek bed owned by the City. It is undisputed that this system was consistent with or above the state of the art at the time of its construction.

Throughout Arkansas there exist natural subsurface water systems. These natural "pipelines" are actually passages eroded from the underground limestone rock. Water from the land surface moves underground, travels rapidly through these underground systems and finally flows into springs located throughout Arkansas.

Barron Collier operates a trout farm situated on a downstream segment of the dry creek bed into which sewage is discharged from the Bradshaw lift station. His fish are raised in springs watered by an underground water system. On July 28, 1977, and July 13, 1980, the Bradshaw lift station experienced unforeseen mechanical failures necessitating sewage discharges through the overflow pipe. The sewage entered the ground and subsurface waters polluting Collier's springs and causing sudden massive fish kills at his trout farm.

Collier commenced this action claiming that his property had been taken without just compensation and due process in violation of the fourteenth amendment of the United States Constitution. Collier sought monetary damages from the City, the Commission and

certain officials[1] for the pollution of his springs resulting from the discharge of sewage by appellants. In addition, Collier sought injunctive relief against the future occurrence of such action. Redress was pursued under 42 U.S.C. § 1983 and its jurisdictional counterpart 28 U.S.C. § 1343. The district court denied several motions submitted by the City and the Commission including a motion to dismiss for failure to state a claim under 42 U.S.C. § 1983. Collier ultimately prevailed at trial and was awarded $36,740.00 in damages; the district court granted an injunction enjoining the City and the Commission from permitting further sewage discharges at the Bradshaw lift station.

II. DISCUSSION

Section 1983[2] grants a civil remedy to persons deprived of constitutional rights by persons acting under the color of state law. In *Parratt* v. *Taylor,* 451 U.S. 527 (1981) (*Parratt*), a state prison inmate was deprived of a $23.50 hobby kit that he had ordered because a prison official negligently mishandled the prison mail.

[1] Prior to submitting the case to the jury, the trial judge instructed that he had, as a matter of law, dismissed the claims against the three individual defendants. The jury was also told that the City and the Commission were to be treated as a single entity. Transcript at 645-46.

[2] Originally passed in 1871, the Civil Rights Act, 42 U.S.C. § 1983 (1976 & Supp. V 1981) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or any other proper proceeding for redress.

Id. at 529-30. Stating that the fourteenth amendment protects only against deprivations without due process of law, the Court held that where deprivations of property are random and unauthorized and it is therefore impossible for the state to provide a meaningful predeprivation hearing, due process is satisfied by the existence of an adequate postdeprivation state remedy. *Id.* at 541.

Writing for the majority, Justice Rehnquist stated that

> in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

Id. at 535. As in *Parratt*, it is clear that the alleged conduct of the City and the Commission satisfies the "under the color of state law" requirement and therefore we must only decide whether Collier has been deprived of a right, privilege or immunity secured by the Constitution or laws of the United States.

Collier alleges that his substantive right to just compensation under the fifth and fourteenth amendments[3] was violated when appellants "took" his fish

[3]The fifth amendment of the United States Constitution provides that "private property [shall not] be taken for public use without just (fn. continued)

and diminished the value of his property without any prior notice, hearing or compensation.[4] The City and the Commission concede that the sewage discharges on July 28, 1977, and July 13, 1980, caused the fish kills at Collier's trout farm, but argue that Collier's injuries are the result of lawful takings pursuant to the sovereign's power of eminent domain. Therefore, appellants argue, Collier is only entitled to just compensation for the loss of his fish under applicable state provisions and thus has failed to demonstrate a cognizable constitutional violation.

It is clear that the mere exercise of the sovereign's power of eminent domain is not offensive to due process. *See Chicago, Burlington & Quincy R.R.* v. *City of Chicago*, 166 U.S. 226 (1897). The parties acknowledge that appellants had the authority under the United States Constitution and Arkansas Constitution to condemn private land for public use. Collier notes that the sewage discharges were in accordance with established

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compensation." U.S. Const. amend. V. This prohibition has been incorporated to apply to the states through the due process provision of the fourteenth amendment. *See Chicago, B. & Q. R.R.* v. *City of Chicago*, 166 U.S. 226, 235-41 (1897).

[4] Both parties and the court below relied heavily on *Parratt* v. *Taylor*, 451 U.S. 527 (1981) (*Parratt*), and its progeny in support of their respective positions. We believe this reliance is misplaced. As we will demonstrate, the Supreme Court's rationale in *Parratt* further supports our conclusions in the present case. However, unlike *Parratt*, this case is more appropriately characterized as an authorized governmental "taking" allegedly in violation of Collier's constitutional right to just compensation rather than a tortious deprivation of property in violation of rights to procedural due process. Thus, more directly on point is a distinct line of cases addressing the issue of federal jurisdiction over state inverse condemnation actions such as this.

state procedure and not random and unauthorized conduct by City officials. Thus Collier argues that *Parratt* requires that he be afforded notice and a hearing before his property is taken. *See Parratt*, 451 U.S. at 537. Long ago the Supreme Court made it clear that the fifth amendment of the United States Constitution "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed." *Cherokee Nation* v. *Southern Kansas Ry.*, 135 U.S. 641, 659 (1890). If the government chooses to dispense with formal condemnation proceedings prior to the seizure of private property for public use, then the constitution only requires that the property owner be able to bring an inverse condemnation action to compel just compensation. *See Fountain* v. *Metropolitan Atlanta Rapid Transit Authority*, 678 F.2d 1038, 1043 (11th Cir. 1982) (*Fountain*). Thus, it is well settled that a sovereign vested with the power of eminent domain may exercise that power consistent with the constitution without providing prior notice, hearing or compensation so long as there exists an adequate mechanism for obtaining compensation. *See Yearsley* v. *Ross*, 309 U.S. 18, 22 (1940); *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932); *Fountain*, 678 F.2d at 1045, n.13; *Stringer* v. *United States*, 471 F.2d 381, 383 (5th Cir.), *cert. denied*, 412 U.S. 943 (1973); *Light* v. *Blackwell*, 472 F. Supp. 333, 337 (E.D. Ark. 1979), *aff'd. mem.*, 620 F.2d 307 (8th Cir. 1980); (*Light*); *Kao* v. *Red Lion Municipal Authority*, 381 F.Supp. 1163, 1166 (M.D.P.A. 1974) (*Kao*).*

*Collier seems to suggest that he should have been given an oppor- (fn. continued)

Several courts have refused to find a cause of action under 42 U.S.C. § 1983 where a plaintiff alleges a "taking of his property by the state without due process without first attempting to avail himself of the state

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tunity to voice his opposition to the City's sewage practices. If the City's actions resulted in a taking for public use, these cases make it clear that Collier is only entitled to just compensation and not an opportunity to challenge the propriety of the practice either before or after the taking. Assuming the system chosen by the City was approved by the governing state and federal agencies, the City's decision to adopt that plan in lieu of another is a legislative act. The protections of procedural due process do not apply to legislative acts:

> Where a rule of conduct applies to more than a few people, it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. . . . There must be a limit to individual argument in such matters if government is to go on.

Bi-Metallic Inv. Co. v. *State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (Holmes, J.). This position was recently reiterated by the Third Circuit in deciding whether individuals had the right to due process protections prior to the passage of zoning regulations:

> To provide every person affected by legislation the various rights encompassed by procedural due process — including hearings, opportunity for confrontation and response, clear standards, an impartial arbiter, and possibly judicial review — would be inconsistent with the structure of our system of government. The act of legislating necessarily entails political trading, compromise, and ad hoc decisionmaking which, in the aggregate, produce policies that at least approximate a fair and equitable distribution of social resources and obligations.
>
> Absent an indication that this process inherently treats a particular class of persons inequitably, it is unnecessary for the courts to intervene because the relatively large number of persons affected works to ensure that the legislature will not act unreasonably to-

(fn. continued)

mechanisms for compensation following the *de facto* appropriation. For example, in *Light* the plaintiffs claimed that certain conduct by the Arkansas State Highway Commission amounted to a taking of their property without just compensation and the continuing torts of trespass, nuisance, and unreasonably depriving the plaintiffs of lateral support for their property. Equitable and monetary relief was sought pursuant to § 1983. The court succinctly stated that "the plaintiffs here have not been deprived of due process since due process remedies are available to the plaintiffs in state court for the alleged taking of their property." 472 F. Supp. at 336.[6] The court refused to permit the property owners to bypass adequate Arkansas statutory and administrative provisions specifically designed to appropriately compensate such litigants within a minimum

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> ward the populace. In short, the general theory of republican government is not due process through individual hearings and the application of standards of behavior, but through elective representation, partisan politics, and the ultimate sovereignty of the people to vote out of office those legislators who are unfaithful to the public will. Inasmuch as the Supervisors, in passing the zoning amendments, were acting in a legislative capacity, Mark-Garner has no procedural due process claim against their actions.

Rogin v. *Bensalem Township*, 616 F.2d 680, 693 (3d Cir. 1980) (footnotes) omitted), *cert. denied*, 450 U.S. 1029 (1981).

[6] Addressing plaintiffs' claim that the state had committed a willful and continuous trespass over their land, the court said, "[w]hile the due process clause of the fourteenth amendment and Civil Rights Act protect 'property' rights as well as 'personal' rights, a trespass to property, negligent or intentional, is merely a common law tort and does not infringe on the federal constitution." *Light* v. *Blackwell*, 472 F. Supp. 333, 337 (E.D. Ark. 1979) (citing *Kao* v. *Red Lion Mun. Auth.*, 381 F. Supp. 1163, 1166 (M.D. Pa. 1974) (*Kao*) (citations omitted)), *aff'd mem.*, 620 F.2d 307 (8th Cir. 1980) (*Light*).

time frame. *Id.* at 338. *Accord O'Grady* v. *City of Montpelier,* 573 F.2d 747, 751 (2d Cir. 1978); *Elterich* v. *City of Sea Isle City,* 477 F.2d 289, 291 (3d Cir. 1973); *Dutton* v. *City of Crest Hill,* 547 F. Supp. 38, 40 (N.D. Ill. 1982); *Kohlasch* v. *New York State Thru Way Authority,* 460 F. Supp. 956, 960-61 (S.D.N.Y. 1978).[7] Finally, "to adjudicate [these] claims . . . would be an unwarranted interference with state court jurisdiction." *Light,* 472 F. Supp. at 337 (citations omitted). Collier cannot seriously contend that the Supreme Court in *Parratt* meant to negate the existing precedent and create a cause of action where none previously existed. Several cases decided since *Parratt* have reaffirmed the continuing validity of these principles. *See Edwards* v. *Arkansas Power & Light Co.,* 683 F.2d 1149, 1153 (8th Cir. 1982); *Fountain,* 678 F.2d at 1045, n.13; *Dutton* v. *City of Crest Hill,* 547 F. Supp. at 40.[8]

[7] In *Stearns* v. *Smith,* 551 F. Supp. 32, 36 (S.D. Tex. 1982), the court said that the Fifth Circuit has not required plaintiffs to first resort to adequate state remedies for just compensation before bringing a § 1983 action in federal court. We are not convinced that the Fifth Circuit has taken such a position. The case cited for that proposition did not deal with governmental takings of private property, but with constitutional challenges to the state's method of terminating public employment. *See Battle* v. *Mulholland,* 439 F.2d 321 (5th Cir. 1971). Even if the Fifth Circuit would reach a different conclusion on the facts before us, we believe that those cases cited in support of our position are better reasoned.

[8] Certain *Parratt* progeny have held *Parratt* inapplicable "to instances where the substantive guarantees of the Constitution are alleged to be violated, as opposed to alleged violations of procedural due process." *Wolf-Lillie* v. *Sonquist,* 699 F.2d 864, 872 (7th Cir. 1983) (*Parratt* inapplicable to alleged violations of the fourth amendment substantive right to be free from unlawful seizures). *See also Duncan* v. *Poythress,* 657 F.2d 691, 704-05 (5th Cir. 1981) (*Parratt* inapplicable to alleged voting rights (fn. continued)

Collier does not dispute that appellants possess the power of eminent domain. The Arkansas Constitution guarantees just compensation for private property appropriated or damaged for public use by governmental entities.[9] Further, an Arkansas statute establishes the measure of recovery for real or personal property so taken or damaged and grants a cause of action for the recovery of such amounts.[10] These provisions have

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violation), *cert. dismissed*, 103 S. Ct. 368 (1982); *Morehead* v. *Virgin Islands*, 556 F. Supp. 174, 176-77 (D. V.I. 1983) (*Parratt* does not apply to alleged violations of one's first amendment right to free speech). Relying on these cases the court in *Tomkins* v. *Village of Tinley Park*, 566 F. Supp. 70, 77 (N.D. Ill. 1983) (*Tomkins*), concluded that the property owner stated a claim cognizable under § 1983 because she alleged a violation of the fifth amendment substantive right to just compensation. We believe that this interpretation misperceives the import of those cases protecting against substantive violations of personal rights as distinguished from property rights. Further, the court in *Tomkins* does not explain why it believes *Parratt* effectively negates the precedent previously cited in this opinion. *See, e.g., Yearsley* v. *Ross*, 309 U.S. 18, 22 (1940); *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932); *Fountain* v. *Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1045, n.13 (11th Cir. 1982); *Stringer* v. *United States*, 471 F.2d 381, 383 (5th Cir.), *cert. denied*, 412 U.S. 943 (1973); *Light*, 472 F. Supp. at 337; *Kao*, 381 F. Supp. at 1166.

[9] Article 2, § 22 of the Arkansas Constitution provides: "Property rights — Taking without just compensation prohibited. — The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."

[10] Ark. Stat. Ann. § 35-101 (1962) provides:

> Remedy of owner for property taken — Measure of recovery. — Whenever any corporation authorized by law to appropriate private property for its use shall have entered upon and appropriated any property, real or personal, the owner of such property shall have the right to bring an action against such corporation in the circuit court of the county in which said property is situated for damages for such

(fn. continued)

often been used to secure relief for damages caused by sewage discharges. *See Sewer Improvement District No. 1* v. *Jones*, 199 Ark. 534, 134 S.W.2d 551, 555 (1939); *Jones* v. *Sewer Improvement District No. 3*, 119 Ark. 166, 177 S.W. 888, 889-90 (1915); *McLaughlin* v. *City of Hope*, 107 Ark. 442, 155 S.W. 910, 911 (1913).

It appears that these provisions fully preserve all the constitutional protections due Collier for the public taking, injury or destruction of his property, real or personal. *See Kao*, 381 F. Supp. at 1166. In the state court Collier might have urged all the matters raised here, yet he has chosen not to avail himself of the state mechanisms for compensation. Instead, he argues that these Arkansas procedures will prove to be inadequate to protect his right to compensation. *See Fountain*, 678 F.2d at 1045, n.13. In *Edwards* v. *Arkansas Power & Light Co.*, 683 F.2d 1149, this court was unwilling to find the state remedy adequate where it was unclear whether Arkansas law provided a cause of action for bad faith on the part of the utility company in appraising the plaintiff's property in addition to one for the plaintiff's claim for just compensation. *Id.* at 1153-55. However, Collier's challenge to the adequacy of the state remedy is not premised on the unavailability of a cause of action distinct from his claim for just compensation. Rather, Collier claims that the state just

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appropriation at any time before an action at law or in equity for the recovery of the property so taken, or compensation therefor, would be barred by the statute of limitations and the measure of recovery in such action shall be the same as that governing proceedings by corporations for the condemnation of property.

compensation mechanism is rendered inadequate by an Arkansas statute providing municipalities immunity from tort liability.[11] At this point we find it unnecessary to decide whether a statutory grant of sovereign immunity makes an available state remedy inadequate thus making it insufficient to satisfy the requirements of due process. Collier cites no Arkansas cases to support the proposition that an action based on appropriation of or damage to private property for public use is barred by the Arkansas tort immunity statute.[12] To the contrary, it is clear that the Arkansas courts distinguish between tort actions and claims for just compensation insofar as tort immunity is concerned. In *Chamberlain* v. *Newton County*, 266 Ark. 516, 587 S.W.2d 4 (1979), the Supreme Court of Arkansas held that the Chancery Court had no jurisdiction to entertain a suit in damages for trespass on the ground that the county was immune from damages in a tort action under the tort immunity statute.[13] However, the court noted that

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[11] Ark. Stat. Ann. § 12-2901 (1979) provides:

> State subdivisions immune from tort liability. — It is hereby declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the State shall be immune from liability for damages, and no tort action shall lie against any such political subdivision, on account of the acts of their agents and employees.

[12] To hold that just compensation will not be afforded for de facto taking is likely to be constitutionally infirm. We will presume that the state courts will interpret their laws in accordance with the mandates of the just compensation clause.

[13] The tort immunity statute, of course, does not bar injunctive relief to enjoin the municipality from creating a nuisance or abating one already in existence. *See Sewer Improvement Dist. No. 1* v. *Jones*, 199 Ark. 534, 134 S.W.2d 551, 554 (1939).

the plaintiff had a remedy in county court for just compensation for the taking of her property. *Id.* at 6-7. *See also Sewer Improvement District No. 1* v. *Jones*, 134 S.W.2d at 552-53. The Supreme Court said in *Parratt*, 451 U.S. at 544:

> Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process. The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process.

In light of these authorities we hold that Arkansas provides adequate mechanisms for compensating property owners such as Collier whose property was taken for public use, as well as for prospective injunctive relief to enjoin future occurrence of such conduct. *See Light*, 472 F. Supp. at 339. We also hold that the availability of these state law mechanisms precludes finding that the taking of Collier's property was in violation of a right, privilege or immunity secured by the Constitution or laws of the United States; thus he has failed to state a claim for the taking of his property cognizable under 42 U.S.C § 1983. As noted in *Light*, 472 F. Supp. at 338, "[t]o assume jurisdiction in a case of this type would mean the opening of a floodgate to a multiplicity of federal actions involving all aspects of state eminent domain proceedings which in truth should be

adjudicated under state procedures and in state forums."

Accordingly, the judgment of the district court is reversed and remanded with directions that this action be dismissed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX III

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

83-1567-WA. September Term, 1983

BARRON COLLIER, D/B/A
OZARK TROUT FARM,
Appellee,

VS.

CITY OF SPRINGDALE,
ET AL.,
Appellants.

Appeal from the United States District Court
for the Western District of Arkansas

Petition of appellee for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby denied.

June 5, 1984

Office-Supreme Court, U.S.
FILED
AUG 27 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-164 (2)

In The

Supreme Court of the United States

October Term, 1983

BARRON COLLIER, d/b/a OZARK TROUT FARM,

Petitioner,

vs.

CITY OF SPRINGDALE AND THE SPRINGDALE WATER AND SEWAGE COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DAVID S. HERDLINGER*
THURSTON A. THOMPSON
HERDLINGER, JACOWAY AND STANLEY, PA
P.O. Box 687
Springdale, AR 72764

Attorneys for the City of Springdale and the Springdale Water and Sewage Commission

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTION PRESENTED

Whether an inverse condemnation or other taking of property by a municipal corporation, whether negligent or intentional is, under Arkansas law, without due process so that the act gives rise to an action under Title 42 U.S.C. §1983.

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No. 84-164

In The

Supreme Court of the United States

October Term, 1983

BARRON COLLIER, d/b/a OZARK TROUT FARM,

Petitioner,

vs.

CITY OF SPRINGDALE AND THE SPRINGDALE WATER AND SEWAGE COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents City of Springdale and Springdale Water and Sewer Commission respectfully request that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the United States District Court, Western District of Arkansas, Fayetteville Division, in *Barron Collier, d/b/a Ozark Trout Farm v. City of Springdale and the Springdale Water and Sewer Commission*, on February 12, 1983, is reproduced at Appendix I, page A-1 of the Petition. The opinion of the United States Court of Appeals for the Eighth Circuit, entered on May 8, 1984, is reproduced at Appendix II, page A-16 of the Petition. The opinion of the United States Court of Appeals for the Eighth Circuit, entered on June 5, 1984, is reproduced at Appendix III, page A-16, of the Petition.

JURISDICTION

The Court has jurisiction to review this matter pursuant to 28 U.S.C. §1254(1).

REASONS FOR DENYING WRIT

Petitioner has failed to support his allegations that the Eighth Circuit Court of Appeals has (a) decided an important question of federal law which has not been, but should be, settled by this Court and (b) has decided a federal question in a way that conflicts with applicable decisions of this Court.

Respondents, City of Springdale and Springdale Water and Sewage Commission, have no objections to the petitioner's "Statement of Case".

Respondents disagree with the argument put forth in petitioner's "Grounds for Allowance of Writ of Certiorari". Specifically, respondents urge that the petitioner has misconstrued the opinion of the Eighth Circuit Court of Appeals when he states "the U. S. Court of Appeals, in its opinion dated May 8, 1984, extended the doctrine of *Parratt v. Taylor*, 451 U.S. 527 (1981) and found that the existence of a post-deprivation remedy barred petitioner from pursuing an action under 42 U.S.C. 1983."

The U. S. Court of Appeals, in footnote 4 of its opinion (at page A-21 of the Appendix to petitioner's petition) explained its position vis-a-vis *Parratt*: "we believe this reliance is misplaced. As we will demonstrate, the Supreme Court's rationale in *Parratt* further supports our conclusions in the present case. However, unlike *Parratt*, this case is more appropriately characterized as an unauthorized governmental 'taking' allegedly in violation of Collier's constitutional right to just compensation rather than a tortious deprivation of property in violation of rights to procedural due process. Thus, more directly on point is a distinct line of cases addressing the issue of federal jurisdiction over state inverse condemnation actions such as this." Actually, one is hard pressed to find other cases in which inverse condemnation or taking of property without due process has been held to be a Section 1983 Civil Rights action. In fact, early authority is to the effect that eminent domain is a state matter to be dealt with in state courts. *Mississippi and Rum River Boom Co. v. Patterson*, 98 U.S. 403.

Likewise, the U. S. Supreme Court, in a line of procedural due process cases, has looked to the available state remedies to determine whether they afforded sufficient due process to satisfy the Constitution. *Parratt v. Taylor,* 451 U.S. 527 (1981); *Ingraham v. Wright,* 430 U.S. 651 (1977). In these cases, the Court did not dismiss for failure to exhaust state remedies but rather dismissed on the merits because the available state remedies which complied with due process had not been followed.

While the Supreme Court has frequently found that some kind of prior hearing is necessary to guard against any arbitrary infringement of Fourteenth Amendment interests, those requirements are significantly lessened where the state has preserved what "had always been the law of the land". *United States v. Barnett,* 376 U.S. 681 (1964).

Post-deprivation hearings do not, per se, deprive one of due process. *Ingraham v. Wright,* 430 U.S. 651 (1977); *Ewing v. Mytinger and Casselberry,* 339 U.S. 594 (1950); *Fahey v. Mallonee,* 322 U.S. 245 (1947); *Bowles v. Willingham,* 321 U.S. 503 (1944); *Yakus v. United States,* 321 U.S. 414 (1944); *Phillips v. Commissioner,* 283 U.S. 589.

Arkansas, through its constitution and statutes, has provided a means of redress to any person deprived of property by an act of the state. Arkansas Constitution, Art. II, Section 22. Ark. Stat. Ann. §35-101. The Arkansas statute is sufficiently broad to cover petitioner's situation. It provides: "Whenever any corporation authorized by law to appropriate private property for its use shall have entered upon and appropriated any property, real or personal, the owner of such property shall have the right to bring an action against such corporation in

the Circuit Court of the county in which said property is situated for damages for such appropriation at any time before an action at law or in equity for the recovery of the property so taken, or compensation therefor, would be barred by the statute of limitations and the measure of recovery in such action shall be the same as that governing proceedings by corporations for the condemnation of property". [Act Apr. 11, 1893, No. 149, Section 1, p. 261; C.&M. Dig., §§3930, 3931, Pope's Dig., §§4931, 4932].

The purpose of this statute is to implement the necessary remedy to carry out the intent of Article II, Section 2 of the Arkansas Constitution which provides: "The right of property is before and higher than any constitutional sanctions; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor".

The protections guaranteed by the Arkansas Constitution have been used by Arkansas plaintiffs for decades to secure relief for damage caused by sewer discharges. *Sewer Improvement Dist. No. 1 of Sheridan v. Jones,* 199 Ark. 534, 134 S.W.2d 551 (1939); *Jones v. Sewer Improvement Dist. No. 3 of City of Rogers,* 119 Ark. 166, 177 S.W. 888 (1915); *City of El Dorado v. Scruggs,* 113 Ark. 239, 168 S.W. 846 (1914); *McLaughlin v. City of Hope,* 107 Ark. 442, 155 S.W. 910 (1913). More recently, the Supreme Court of Arkansas has upheld the intent of Ark. Const., Article II, Section 22, against rules of the Arkansas State Game and Fish Commission which were in opposition to the Constitution. *She'lnut v. Arkansas State Game and Fish Commission,* 222 Ark. 25, 258 S.W.2d 570 (1953).

The State of Arkansas has a compelling interest in the determination of the constitutionality of and the scope of its statutes by its own judiciary. In such circumstances, abstention from ruling in such cases or dismissal by the federal court is warranted in order that the state court be given an opportunity to resolve any conflict.

CONCLUSION

The question cited is neither new nor unique. The law regarding eminent domain is well settled and seldom successfully contested. There is no compelling reason why inverse condemnation actions should suddenly become a source for civil rights litigation.

The petition should be denied.

Respectfully submitted,

DAVID S. HERDLINGER*
THURSTON A. THOMPSON
HERDLINGER, JACOWAY AND STANLEY, PA
P.O. Box 687
Springdale, AR 72764

Attorneys for the City of Springdale and the Springdale Water and Sewage Commission

*Counsel of Record